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**FOOD SECURITY AS BUSINESS OF BUSINESS:  
THE “RUGGIE FRAMEWORK” AND BEYOND**

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## **Food security as business of business: The “Ruggie Framework” and beyond**

*Paper submitted for the  
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### **I. Introduction**

On-going discussions on food security as both an element of the right to food and a goal for agricultural policy focus on the situation of the respective rights holders and the corresponding duty-bearers, i.e. individuals and the state. Yet, the coincidence of the recent food crisis and the financial crisis revealed a substantial analytical lack in addressing the impact of the business sector on food security. Meanwhile, it is broadly acknowledged that land grabbing, food commodities speculation and the increasing production of bio fuels can have a negative impact on food security. So far, only limited research has been undertaken to understand how the private sector addresses situations where the public policies may not adequately take into account individual rights such as the right to have access to food. Given that there is still no comprehensive international framework for corporate human rights responsibility, standards that have been initiated by industries and companies in the context of corporate social responsibility are increasingly relevant. In addition, the new “Protect, respect and remedy” framework adopted by the UN Human Rights Council in 2008 and complemented with the adoption of the respective Guidelines in 2011 raises the question to what extent states have an obligation to ensure responsible corporate behaviour.

This paper contributes to the discussion on implementing the Ruggie framework in a trade context by adding a third layer of analysis to the existing focus on the individual as the holder of the right to food security and the state as the bearer of the corresponding duties both under human rights and international trade law. It will explore the role of

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business in acting as an intermediary between the individual, micro-level and public policy at the macro-level.

As a result, the paper proposes a comprehensive three-dimensional approach towards the implementation of food security that goes beyond the Ruggie framework.

Three proposals to overcome existing regulatory deficits and research gaps are submitted: (1) a need for analysing motivation and dynamics at the meso- level (business), (2) improving regulatory procedures by mainstreaming the Protect, Respect and Remedy Framework into business-related policies and regulations and (3) improving regulatory substance by including findings from *meso*-level analysis in the substance of regulations.

## **II. The architecture of food security**

### **1. The fabric of food security**

There are many definitions of food security depending on context and background.<sup>1</sup> Consensus can be established on the concept of the World Food and Agriculture Organisation (FAO) which defined food security as the state “when all people, at all times, have physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life.”<sup>2</sup> Food security is therefore not limited to an adequate calorie intake but includes nutritional quality, safety and cultural appropriateness of food. Three key drivers for food security have been identified:<sup>3</sup> *Food availability* which relates not only to the distribution but also to the production and possibility to exchange money or other items of value for food. The second is *access* to the type, quality and quantity of food required. In this regard, affordability, allocation mechanisms and food preferences play an important role.

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<sup>1</sup> Christine Kaufmann, Simone Heri, *Liberalizing Trade in Agriculture and Food Security* - Mission Impossible? Vanderbilt Journal of Transnational Law 40 (2007), 1039-1070, 1048.

<sup>2</sup> Rome Declaration and World Food Summit Plan of Action, FAO, Rome 1996, para. 1.

<sup>3</sup> Polly Ericksen, Beth Stewart, Jane Dixon, David Barling, Philip Loring, Molly Anderson and John Ingram, *The Value of a Food System Approach*, in: John Ingram, Polly Ericksen and Diana Liverman (eds), *Food Security and Global Environmental Change*, London/Washington 2010, 25-45, 29.

Finally, *utilisation of food* includes the ability to consume and benefit from food. Therefore, nutritional and social values as well as food safety are essential.

## **2. Actors**

Based on this definition of food security, *individuals* play a key role as holders of the right to food – which food security is part of – and as producers and consumers of food. The correspondent legal obligation rests primarily upon *states*. According to the International Covenant on Economic, Social and Cultural Rights, it is their obligation to respect, protect and fulfil the human right to adequate food. Thus, from a human rights perspective, there is a clear distinction between the right-holders at the *micro-level* and duty-bearers at the *macro-level*. As long as rights and obligations match, such a two-prong analysis may be sufficient. Yet, reality looks different:

Recent developments such as the coincidence of the food and the financial crisis together with climate change, show that the activities of private businesses have a substantial impact on people’s enjoyment of the right to food and may in fact even play a bigger role than the public sector. Since most actors in the food supply chain<sup>4</sup> – production, processing, trade and distribution, wholesale and retail – are private entities, the private sector has a direct *factual* impact on food security.<sup>5</sup> On the one hand, this impact may be positive if companies create employment under conditions that enable employees and workers to feed themselves and their families and provide infrastructure such as access to safe water. On the other, business activities may undermine people’s access to food by contaminating land and or water for example in the context of mining activities.

Despite the potential impact of business activities on food security, the role of the private sector is not reflected in the traditional theoretical framework. This paper argues that a third *meso-level* of analysis needs to be introduced in order to understand

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<sup>4</sup> For a detailed description of the food supply chain in all its complexities Michael J. Maloni, Michael E. Brown, *Corporate Social Responsibility in the Supply Chain: an Application in the Food Industry*, Journal of Business Ethics 68 (2006), 35-52, 37-38.

<sup>5</sup> Office of the High Commissioner for Human Rights, *The Right to Adequate Food*, Human Rights Fact Sheet no. 34, Geneva 2010, p. 25.

new phenomena such as the regulatory role of private standards. As its name suggests, the meso-level situates itself between the micro- and the macro-level. In an environment where individual interests and state policies on food security may be misaligned, businesses need to develop their own mechanisms for addressing this dilemma. Business activities will have an impact – whether deliberate or not – of their own on food security. At the same time, business activities are driven by corporate policies such as corporate social responsibility (CSR) which may be influenced by external factors such as public opinion or consumer reactions.

International law has struggled to accommodate business in its conceptual framework for decades. It is only recently that the United Nations Human Rights Council adopted a new “Protect, Respect and Remedy” framework (the so-called “*Ruggie Framework*”) as well as the complementary Guiding Principles on Business and Human Rights (*Guiding Principles*)<sup>6</sup> that a way out of the year-long dead end could be found.

This paper will shed light on the interaction between individuals at the micro- and states at the macro-level, with businesses acting as a mediator at the meso-level. It will put forward a concept for a clearer understanding of what business responsibility in the food security context means.

### **III. Current state of food security**

#### **1. Triple crises**

With the coincidence of three global crises – climate change, food and finance – food security became an item on the agenda in institutions which are not traditionally engaged with human rights.<sup>7</sup>

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<sup>6</sup> Protect, Respect and Remedy: a Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/8/5, 7 April 2008; Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/17/31, 21 March 2011.

<sup>7</sup> For a more detailed discussion see Christine Kaufmann, *International Law in Recession? The role of international law when crisis hits: Food, finance and climate change*, U. Fastenrath, R. Geiger, D-E.

The end of 2009 marks a turning point since the number of severely undernourished people reached an unprecedented high, and for the first time in human history exceeded one billion.<sup>8</sup> Food prices peaked in February 2011 with the highest level recorded since 1990.<sup>9</sup> Since then price levels have fallen by about 14% until May 2012 and – according to the FAO – seem to have stabilized at a relatively high level. Overall, the period since 1990 is characterized by tight food supplies, higher prices and increased price volatility.<sup>10</sup>

One of the manifold reasons underlying the food crisis are changes in the environmental context. This includes large-scale changes in land use, biogeochemical cycles, climate and biodiversity. Together, they collectively constitute a global environmental change that is occurring at an unprecedented scale of human intervention in the earth system.<sup>11</sup> Recent results from research on climate change therefore play an essential role in understanding the food crisis.<sup>12</sup>

The third crisis is the financial crisis which has been at the centre of public attention for almost five years now. At the beginning, the collapse of Northern Rock and Lehman Brothers in 2008 sparked a series of meetings of ministers and heads of State, followed by another spell of intense high-level negotiations with regard to the developments in

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Khan, A. Paulus, S. von Schorlemer, Ch. Vedder (eds.), *From Bilateralism to Community Interest, Essays in Honour of Bruno Simma*, Munich 2011, 1189-1206.

<sup>8</sup> World Food and Agriculture Organization, *The State of Food Insecurity in the World 2009* (2009) 11 <<http://www.fao.org/docrep/012/i0876e/i0876e00.HTM>> (accessed 18 June 2012). “Billion” means a thousand million.

<sup>9</sup> World Food and Agriculture Organisation, *FAO Food Price Index (FFPI)*, available at <<http://www.fao.org/worldfoodsituation/wfs-home/foodpricesindex/en/>> (accessed 16 June 2012). The FAO Food Price Index is a measure of the monthly change in international prices of a basket of food commodities. It consists of the average of five commodity group price indices (representing 55 quotations), weighted with the average export shares of each of the groups for 2002-2004.

<sup>10</sup> FAO, *World Food Outlook*, May 2012. Available at <<http://www.fao.org/docrep/015/al989e/al989e00.pdf>> (accessed 16 June 2012).

<sup>11</sup> Diana Liverman and Kamal Kapadia, *Food Systems and the Global Environment: An Overview*, in Ingram, Ericksen and Liverman (note 3), 3.

<sup>12</sup> IPCC, *Climate Change 2007: Synthesis Report*, Contribution of Working Groups I, II and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change (IPCC, 2008) 104 et seq., available at <[http://www.ipcc.ch/publications\\_and\\_data/publications\\_ipcc\\_fourth\\_assessment\\_report\\_synthesis\\_report.htm](http://www.ipcc.ch/publications_and_data/publications_ipcc_fourth_assessment_report_synthesis_report.htm)> accessed 29 June 2010.

the Euro Zone. Neither the World Food Summit in November 2009, nor the Climate Summit in Copenhagen in December 2009, nor even the Rio+20 Conference in Rio de Janeiro in June 2012 succeeded in creating a similar sense of urgency among world leaders.

## **2. Effects on the individual: Micro-level**

From an individual and a human rights perspective, the *distributive* effects of the crises are crucial. Particularly affected by these developments and the triple occurrence of the crises are the poor.<sup>13</sup> An example is the production of biofuels which has been promoted as a means to combat climate change. It is characterized by large scale land acquisitions usually undertaken by big companies often engaged in partnerships with the respective government.

While workers employed by the companies engaged in the production of bio fuel may be better off, small scale farmers will find it more difficult to have access to farm land with prices rising given the increasing demand. At the same time, due to the financial crisis, obtaining loans for establishing a new business has become more costly. Being deprived of food security can easily trigger the violation of other human rights such as the right to education when children are forced to contribute to the family income instead of going to school or the right to health when malnutrition and unbalanced diets lead to diseases.

## **IV. Macro-Level policies: Preventing market failure – a guarantor for food security?**

### **1. Adjusting priorities: The G-20**

#### *a) The traditional avenue: Food security as an element of sustainable growth*

The three on-going crises were clearly on the agenda of G-20 leaders already in 2009. Following up on the G-8 summit in L’Aquila,<sup>14</sup> at the Summit in Pittsburgh in September

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<sup>13</sup> Rasmus Heltberg, Naoim Hossain, Anna Reva (eds), *Living through Crises: How the Food, Fuel, and Financial Shocks Affect the Poor*, World Bank, Washington 2012.

<sup>14</sup> G-8 Summit 2009, *L’Aquila Joint Statement of Global Food Security—L’Aquila Food Security Initiative* (10 July 2009), available at <<http://www.g8.utoronto.ca/summit/2009laquila/2009-food.html>> (accessed 19 June 2012).

2009, the G-20 made specific commitments to increase access to food, fuel, and finance for the most vulnerable groups. Moreover, G-20 leaders called for identifying new ideas to strengthen the poors’ access to the financial system. In a rather general statement, they agreed “to explore new ways of increasing the capability of the international system to mobilize quickly the resources needed to help the most vulnerable countries deal with future crises”.<sup>15</sup>

Yet, it seems that a few months later, at the G-20 leaders meeting in Toronto, in June 2010, some of the momentum had been lost. With global food prices declining and the costs of the financial crisis for banks and investors reaching US\$2.3 trillion<sup>16</sup> in an estimate published by the International Monetary Fund (IMF) in April 2010,<sup>17</sup> the Final Declaration defined the priorities of the G-20 in very general terms:

“7. The G-20’s highest priority is to safeguard and strengthen the recovery and lay the foundation for strong, sustainable and balanced growth, and strengthen our financial systems against risks [...].

8. The Framework for Strong, Sustainable and Balanced Growth that we launched in Pittsburgh is the means to achieving our shared objectives, by assessing the collective consistency of policy actions and strengthening policy frameworks”.<sup>18</sup>

Still, the door for more inclusive approaches was left open with the plan to explore “innovative, results-focused ways of harnessing private sector innovations”.<sup>19</sup>

In November 2010, the G-20 leaders met in Seoul for their first summit taking place in an emerging country. The “Seoul Action Plan” was adopted as a “comprehensive package of country-specific policy actions to support strong, sustainable and balanced economic

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<sup>15</sup> G-20 Summit 2009, *Leaders’ Statement, Pittsburgh Summit* (24–25 September 2009) paras 22–3 of the preamble, paras 34–9, available at <<http://www.g20.utoronto.ca/2009/2009communique0925.html>> (accessed 17 June 2012).

<sup>16</sup> Trillion means a thousand billion, billion means a thousand million.

<sup>17</sup> International Monetary Fund, ‘World Economic Outlook’ (April 2010) 3, <<http://www.imf.org/external/pubs/ft/weo/2010/01/index.htm>> (accessed 29 June 2010).

<sup>18</sup> G-20 Summit 2010, *The G-20 Toronto Summit Final Declaration* (26-28 June 2010), available at <<http://www.g20.utoronto.ca/2010/to-communique.html>> (accessed 18 June 2012), paras. 7-8.

<sup>19</sup> G-20 Toronto Summit (note 18), para. 34



growth.”<sup>20</sup> In addition, specific measures to better identify currency imbalances as well as IMF quota and governance reforms were agreed upon. Although one of goals of the summit was to include developing countries and their concerns into the debates, the still on-going food crisis as one of the most pressing issues for these countries was only addressed specifically in the final declaration with regard to addressing food market volatility.<sup>21</sup>

*b) AgResults: Result-driven funding for private actors – the road to innovation?*

Since the Seoul summit, the volatility of food prices has become the major concern of the G-20 with regard to food security. In the final declaration of the Cannes Summit in November 2011, a separate section was dedicated to “Addressing Food Price Volatility and Increasing Agriculture Production and Productivity”.<sup>22</sup> A first meeting of G-20 agriculture ministers in June 2011 had paved the way for an agreement by the G-20 leaders on a five point action plan: (1) Improving agricultural production and productivity, (2) increasing market information and transparency, (3) reducing the effects of price volatility for the most vulnerable, (4) strengthening international policy coordination and (5) improving the functioning of agricultural commodity derivatives’ markets.<sup>23</sup>

This plan together with the earlier commitments at the Toronto summit in 2010 fed into the launch of the “AgResults” Initiative at the Los Cabos G-20 Summit on 18 June 2012.<sup>24</sup> The initiative is built on the – not so new – insight that investment in food security needs to be increased and that in order to reach this goal, the private sector needs to be involved more. Therefore, *AgResults* adopts an innovative approach by using so-called *pull mechanisms* to encourage innovation through results-based payments such as prices

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<sup>20</sup> G-20 Summit 2010, *The G-20 Seoul Summit Leaders’ Declaration* (11-12 November 2011), para. 9, available at <<http://www.g20.utoronto.ca/2010/g20seoul.html>>(accessed 18 June 2012).

<sup>21</sup> Seoul Summit Leaders’ Declaration (note 20), para. 12.

<sup>22</sup> G-20 Leaders Summit 2011, *Cannes Summit Final Declaration* (3-4 November 2011), paras.40-51, available at <<http://www.g20.utoronto.ca/2011/2011-cannes-declaration-111104-en.html>> (accessed 18 June 2012).

<sup>23</sup> Cannes Summit Final Declaration (note 22), para. 42.

<sup>24</sup> G-20 Summit 2012, *G20 Leaders Declaration*, Los Cabos, 18-19 June 2012 para. 59.

that are typically paid out when certain objectives or milestones have been met.<sup>25</sup> Instead of setting binding state-led rules, economic incentives are used to trigger the desired behaviour of the private sector.

Implementing a pull mechanism differs from earlier initiatives because the award for desired results will be provided *ex post* instead of granting *ex ante* incentives, such as eg tax concessions or public-private partnerships. Examples for pull mechanisms include the Haiti Mobile Money Initiative which awards \$4 million to the first and second operators to launch mobile money services in Haiti or extending market exclusivity beyond normal patent protection for newly developed drugs against rare disorders as provided in the US Orphan Drug Act of 1983 and similar EU legislation.<sup>26</sup>

It is hoped that this new approach will overcome existing market failures by emphasising *ends* rather than means. Two types of market failures are essential in the context of food security: First, markets may not be able to reflect the social value of innovative measures, i.e. not capture the positive externalities. Second, imperfect information may contribute to low investment in agricultural innovation and to low consumption of innovative goods.

In order to shape this new instrument and tailor it according to the needs several five pilot projects have been defined: crop biofortification, on-farm crop storage, aflatoxin control, livestock vaccination and improved fertilizers. These pilot projects will be implemented and evaluated by a specialist advisory body established specifically for this purpose. After four years an independent external evaluation process is planned.

While the concept note lays out the methodological framework in some detail, nothing is said about how this new approach can be placed in the broader picture of current endeavours to strengthen corporate responsibility for human rights including food security. Most strikingly, no reference to recently developed instruments by the UN Human Rights Council is made.

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<sup>25</sup> AgResults, Innovation in Research and Delivery, draft concept note prepared by the Australian Agency for International Development on behalf of the AgResults Steering Committee, 18 June 2012, available at [http://siteresources.worldbank.org/CFPEXT/Resources/AgResults\\_concept\\_note.pdf](http://siteresources.worldbank.org/CFPEXT/Resources/AgResults_concept_note.pdf) (accessed 19 June 2012).

<sup>26</sup> Concept Note (note 25), para. 7.

## **2. Addressing the role of private actors**

The fact that private investors may contribute substantially to financial crises and further increase already existing market volatilities has been well established in economic literature not least since the East-Asian Financial Crisis of 1997/98.<sup>27</sup> Yet, opinions on how to tackle this phenomenon in a food security context vary considerably.

### *a) Right to food-based approaches*

With regard to food security, the UN Special Rapporteur, Olivier de Schutter issued three briefing notes in 2010/11 to address the role of business and a report to the General Assembly on contract farming in 2011.<sup>28</sup> The first note on Food Commodity Speculation was directly linked to the impact of the financial crisis and the related policy responses.<sup>29</sup> The second dealt with competition law by addressing the unequal power distribution on food markets,<sup>30</sup> and the third was the result of a research project on the role of the WTO in defining a post food crisis agenda.<sup>31</sup> In essence, all briefing notes attempt to address market failures as described above. What was new in de Schutter’s approach is his taking a human rights perspective in addressing market failures.

His findings were further developed and integrated in the Committee on World Food Security (CFS) High Level Panel of Experts’ report on *Price Volatility and Food Security*.<sup>32</sup>

The mentioned reports share a focus on state measures and call for specific measures in the areas of trade, stocks, speculation, investment and demand. They suggest stricter

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<sup>27</sup> Stephan Haggard, *The Political Economy of the Financial Crisis*, Washington 2000.

<sup>28</sup> The right to Food, interim report of the Special Rapporteur on the right food, Olivier De Schutter, A/66/262, 4 August 2011.

<sup>29</sup> Olivier de Schutter, *Food Commodity Speculation and Food Price Crises – Regulation to reduce the risk of price volatilities*, Briefing Note 2/September 2010, available at <<http://www.srfood.org/index.php/en/documents-issued/briefing-notes>> (accessed 19 June 2012).

<sup>30</sup> Olivier de Schutter, *Addressing Concentration in Food Supply Chains – The Role of Competition Law in Tackling the Abuse of Buyer Power*, Briefing Note 3/December 2010, available at <<http://www.srfood.org/index.php/en/documents-issued/briefing-notes>> (accessed 19 June 2012).

<sup>31</sup> Olivier de Schutter, *The World Trade Organisation and the Post-Global Food Crisis Agenda – Putting Food Security First in the International Trading System*, Briefing Note 4/November 2011, available at <<http://www.srfood.org/index.php/en/documents-issued/briefing-notes>> (accessed 19 June 2012).

<sup>32</sup> Committee on World Food Security, High Level Panel of Experts on Food Security and Nutrition, *Report on Price Volatility and Food Security*, Rome, 2011

regulation against speculation with food-related financial instruments (derivatives) following the example of the US Dodd-Frank Act.<sup>33</sup> Neither is there any reference on how business activities can be brought in line with food security, nor is the new Protect, Respect and Remedy framework<sup>34</sup> applied.

*b) Interagency report*

With the adoption of the Food Security pillar in the Seoul Multi-year Action Plan on Development, the G-20 had requested “FAO, IFAD, IMF, OECD; UNCTAD, WFP, the World Bank and the WTO to work with key stakeholders to develop options for G-20 consideration on how to better mitigate and manage the risks associated with the price volatility of food and other agriculture commodities, without distorting market behaviour, ultimately to protect the most vulnerable”.<sup>35</sup> The resulting report “*Price Volatility in Food and Agricultural Markets: Policy responses*” was presented in June 2011.<sup>36</sup> It contains a detailed analysis of several of the main drivers for food price volatility. However, the ten recommendations fall somewhat short of the more promising analysis in the body of the report; thus they reflect some of the difficulties in engaging in interagency cooperation. Not surprisingly, the report was criticised *inter alia* for not taking the discussion to a higher level by addressing the pressing problem of facing higher market volatility and rising prices at the same time. Business behaviour as such is not addressed in the report. In fact, there is no reference to the debate on corporate responsibility for human rights.

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<sup>33</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act 2010 (H.R. 4173), Pub.L. No. 111-203, 124 Stat. 1375, 12 USC 5301 et seq.

<sup>34</sup> See fn 6.

<sup>35</sup> Multi-Year Action Plan on Development, 12 November, 2010, Annex II to the G-20 Seoul Summit Document, action 2, available at < <http://www.g20.utoronto.ca/2010/g20seoul-development.html> > (accessed 20 June 2012).

<sup>36</sup> *Price Volatility in Food and Agricultural Markets: Policy Responses*. Policy Report including contributions by FAO, IFAD, IMF, OECD, UNCTAD, WFP, The World Bank, the WTO, IFPRI and the UN High Level Task Force on Global Food Security, 2 June 2011, available at <[http://www.oecd.org/document/20/0,3746,en\\_2649\\_37401\\_48152724\\_1\\_1\\_1\\_37401,00.html](http://www.oecd.org/document/20/0,3746,en_2649_37401_48152724_1_1_1_37401,00.html)> (accessed 19 June 2012).

c) *National policy: Dodd-Frank Act*

The Dodd-Frank Act was adopted in 2010. It contains a broad package of measures to address the impacts of the financial crisis. Among the various instruments are also provisions to *limit positions* in order to restrict the number of contracts a trading entity could hold during a specific time period (depending on the commodity from 90 days to a year). As a result, speculators’ excessive liquidity and the related price distortion should be prevented. The Commodity Futures Trading Commission (CFTC) which is in charge of implementing the position limits took a first measure in October 2011 by setting a position limit to 28 commodities. However, position limits are heavily criticised by the affected industry. As a result, the International Swaps and Derivatives Association and the Securities and Financial Markets Association filed a lawsuit against CFTC arguing that it had not evaluated the economic impact of the position limit before and that the measure was at best unnecessary may at worst negatively impact commodity markets. At the time of this writing, the case is pending with the District Court for the District of Columbia.<sup>37</sup> Apart from this lawsuit, implementation of the Dodd-Frank Act is generally delayed. Budget increases for providing CFTC with additional resources to implement the Dodd-Frank Act have so far been difficult to pass through Congress. An agreement between the CFTC and the Securities and Exchange Commission on the definition of which derivatives contracts are swaps and will fall under the new trading rules has still not been reached. As a result, the position limits cannot take effect.

Overall, the Dodd-Frank Act follows a risk-based approach by setting detailed technical limits such as the time periods for holding positions. With its broad coverage of issues related to the financial crisis, the Dodd-Frank Act is one of the most complex bodies of regulation for the financial industry. One of the challenges is that it does not provide a clear basic concept of what corporate responsibility entails but rather engages in numerous highly detailed regulations of specific questions.

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<sup>37</sup> International Swaps and Derivatives Association, Securities and Financial Markets Association v. United States Commodity Futures Trading Commission, filed with the US District Court for the District of Columbia, December 2, 2011, No. 11-CV-2146 (RLW).

Despite these shortcomings, many civil society organisations consider Dodd-Frank Act as a minimal standard or model regulation to be introduced in other countries as well.<sup>38</sup>

## **V. The missing link at the meso-level: Business responsibility to respect**

### **1. The business of business is business?**

In 1962 Nobel Prize winner Milton Friedman took a clear stand on what in his view the responsibility of business should be:

“There is one and only one social responsibility of business – to use its resources and engage in activities designed to increase its *profits so long as it stays within the rules of the game*, which is to say, engages in open and free competition without deception or fraud. [...] If businessmen do have a social responsibility other than to making maximum profits for their stockholder, how are they to know what it is? Can self-selected private individuals decide what the public interest is? Can they decide how great a burden they are justified in placing on themselves or their stockholders to serve that social interest?”<sup>39</sup>

In 1974 Friedman further elaborated on his earlier statement in an interview:

“In the first place, the only entities who can have responsibilities are individuals; a business cannot have responsibilities. So the question is, do *corporate executives*, provided they stay within the law, have responsibilities in their business activities other than to make as much money for their stockholders as possible? And my answer to that is, no they do not.”<sup>40</sup>

Friedman’s argument has been summarized ever since with the often quoted phrase. “The business of business is business.” Yet, the “rules of the game” that Friedman

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<sup>38</sup> An example is the report published by Friends of the Earth International, *Farming money: how European banks and private finance profit from food speculation and land grabs*, Brussels, January 2012, at 40 which calls on the EU to “at least follow the US example.” Available at <<http://www.foeeurope.org/farming-money-Jan2012>> (accessed 20 June 2012).

<sup>39</sup> Milton Friedman, *Capitalism and Freedom*, (1<sup>st</sup> edition, Chicago 1962), 40<sup>th</sup> anniversary edition 2002, 133/4 (emphasis added by the author).

<sup>40</sup> “Milton Friedman Responds”, Interview with Milton Friedman, conducted by John McClaughry, in *ChemTech* (February 1974) pp. 72-78, at 72.

referred to in 1962 seem to have substantially changed as the following examples illustrate:

In 2006, the International Employers’ Association submitted a Proposal for addressing dilemma situations in weak governance zones to the then Special Representative of the UN Secretary-General for business and human rights, Professor John Ruggie. The proposal contained a statement that could hardly be in sharper contrast with Friedman’s view:

“The international business community strongly supports respect for human rights not only because it is the right thing to do, but also because protecting human rights benefits all actors in society. To flourish, both domestic and international companies require the same basic principles, government policies and national institutions to protect human rights.”<sup>41</sup>

This new approach which focuses on the connections between societal and economic progress has been conceptualized differently across different disciplines. In international law, business responsibility has been part of a broader debate on the fragmentation of the international legal order<sup>42</sup> while the discussion in economics is focussed on the concept of corporate governance<sup>43</sup> and creating shared value.<sup>44</sup> All these approaches have in common that they represent a change in paradigm and react to a changing environment.

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<sup>41</sup> International Organisation of Employers (IOE), in collaboration with the International Chamber of Commerce (ICC) and the Business and Industry Advisory Committee (BIAC) to the OECD, *Business proposals for effective ways of addressing dilemma situations in weak governance zones*, December 2006, para. 7. Available at <http://www.reports-and-materials.org/Role-of-Business-in-Weak-Governance-Zones-Dec-2006.pdf> (last visited on 16 June 2012).

<sup>42</sup> Christine Breining-Kaufmann, *The Legal Matrix of Human Rights and Trade Law: State Obligations versus Private Rights and Obligations*, in: Thomas Cottier/Joost Pauwelyn/Elisabeth Bürgi (Hrsg.), *Human Rights and International Trade*, Oxford 2005 (Oxford University Press), 95-136.

<sup>43</sup> Andreas Georg Scherer, Guido Palazzo, Dirk Matten, *Globalization as a challenge for business responsibilities*, *Business Ethics Quarterly*, 19 (2009), 327-347.

<sup>44</sup> The concept was first introduced in 2006 and significantly expanded in 2011: Michael E. Porter, *Strategy and Society, The Link between Competitive Advantage and Corporate Social Responsibility*, *Harvard Business Review* 84 (2006), 78-92; Mark R. Kramer, Michael E. Porter, Mark R. Kramer, *Creating Shared Value*, *Harvard Business Review*, 89 (2011), 62-77.

## **2. Changing perceptions and new rules**

At the international level, responsibility of business first became an issue in the UN General Assembly after the alleged involvement of the US based multinational company ITT in the overthrow of the Allende regime in Chile in 1973.<sup>45</sup> It gained new momentum in the 1990s with liberalization, technology, and innovations in corporate structure enabling business to operate globally to an unprecedented extent. This development contributed to an increased awareness of governance gaps which had already – in a different context – been at the heart of the debate in the 1970s: Besides the economic benefit which many countries were able to participate in, the existing legal framework as well as exiting institutions were ill suited to accommodate new actors and keep up with the speed of market expansion in order to address potential negative impacts of these developments.<sup>46</sup>

In a system of international law that is still substantially based on the Westphalian concept of the sovereign state as the prime legal subject, regardless of their impact on people’s live, multinational companies cannot be accommodated easily. During the Nuremberg Tribunals which were the first international tribunals to decide on forced labour in a business context, managers and directors of the German companies IG Farben, Krupp and Flick were charged with abusing forced labourers from concentration camps in their business activities. The Tribunals did not acknowledge legal personality of the involved companies under international law but attributed the crimes against humanity either to the German state or the involved individuals.<sup>47</sup>

Not surprisingly, all attempts within the UN since the 1970s to develop a binding legal framework for holding MNEs accountable under international law after decades of discussions were doomed to fail. The last proposal in this endeavour, the “Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises

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<sup>45</sup> Intelligence Activities, Senate Resolution 21, Hearings before the Select Committee to Study Governmental Operations with Respect to Intelligence of the United States Senate, 94th Congress, 1st session, Vol. 7 *Covert Action*, December 4 and 5, 1975: Appendix A: Covert Action in Chile 1963-1973, pp. 158-160.

<sup>46</sup> Protect, respect and remedy framework (fn 6) para. 104.

<sup>47</sup> United Nations War Crimes Commission, Law Reports of Trials of War Crimes, Volume X, The I.G. Farben and Krupp Trials, London 1949, Case No. 57 (I.G. Farben), Case No. 58 (Krupp).



with Regard to Human Rights” tried to overcome the existing conceptual limits by legally binding states only, while at the same time defining precise rules which as part of the state obligations should have been imposed on companies.<sup>48</sup> What seemed to be a logical approach given the rigid framework unfolded a whole matrix of problems: Why had only some human rights such as labour rights been included in the Draft Norms and not others? How could the sphere of influence which had to be established in order to hold companies responsible be defined?

While business associations such as the International Chamber of Commerce took a firm stand against the Draft Norms on an operational level,<sup>49</sup> many multinational companies had started defining social policies that would include at least some human rights.

Despite turning and twisting concepts around for decades, the fact that the international community was not willing to accept companies as subjects of international law which would have been a prerequisite to hold them legally accountable had remained unchanged.

When John Ruggie was entrusted with the mandate as Special Representative of the UN Secretary-General in 2005, he quickly abandoned the traditional approach of strictly separating the realm of binding state obligations and voluntary corporate behaviour. The Protect, Respect and Remedy Framework of 2008 and the complementary Guiding Principles of 2011 were both accepted by the UN Human Rights Council.<sup>50</sup> In the following sections, the relevance of this framework for food security will be explored.

*a) Lost in translation: negative human rights impact ≠ market failure*

It is striking to note how all the reports mentioned in the previous sections are based on the hypothesis that business behaviour such as large-scale investment or speculation with food related financial instruments may have a negative impact on food security.

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<sup>48</sup> Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, 26 August 2003, E/CN.4/Sub.2/2003/12 (2003).

<sup>49</sup> Joint views of the IOE and ICC on the draft norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights, E/CN.4/Sub.2/2003/NGO/44, 29 July 2003.

<sup>50</sup> Above fn 6.

Although none of the reports precisely defines its underlying notion of “negative impact” it seems to be understood as an effect which is in contrast with the desirable outcomes.

From an economic perspective, markets which operate free from distortion are an obvious objective. As a consequence, price volatility can be seen as a negative impact of distortive business or investor behaviour. With a notion of “impact” that limits itself to functioning markets, there is however hardly any room left for other criteria such as for instance supporting small scale farmers.

In contrast to this view, a notion of impact which is based on substantial (rather than procedural or economic) values would not necessarily consider market failure as negative. In fact it would apply a different approach by first defining the values that warrant protection such as food security for everyone. From a business and investor perspective, the question then arises how far their responsibility for protecting such values can and should go.

This question has been discussed extensively, every time the UN would explore avenues to hold business responsible for human rights violations. In attempt to overcome the dichotomy between relatively clear-cut ideas of what contributing to market failures by business may entail and the open notion of human rights responsibility, the concept of “sphere of influence” was seen as a potential solution. The 2003 Draft Norms stated that businesses should only be held responsible for human rights violations within their sphere of influence.<sup>51</sup> Applied to food security, it seems difficult to establish responsibility of a specific business actor given that it is mostly not a single activity but rather a combination of actions that lead to negative impacts on food security. Moreover, with a view to the complex supply chain in international investment and particularly derivatives, establishing a causal relationship between business behaviour and negative impacts on food security is hardly possible. Measures such as the regulatory proposals for commodity derivatives suggested by the Special Rapporteur on the right to food and partially included in the Dodd-Frank Act as well as the new European OTC Market

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<sup>51</sup> Above, fn 48.

Reform,<sup>52</sup> will therefore not be able to specifically enhance responsible business behaviour but rather establish general trading rules. The question thus remains how to address the perceived risk of business negatively affecting food security.

*b) Protect, respect and remedy framework*

None of the afore mentioned public policy documents addresses the new Protect, Respect and Remedy framework as one of the most important recent developments with regard to business activities and human rights. Given that their declared aim is to enhance standards and practices with regard to business and human rights so as to achieve tangible results for affected individuals and communities, and thereby also contribute to a socially sustainable globalization they would seem a natural complementary element of especially G-20 statements.

The key elements of the “Protect, Respect and Remedy” framework can be summarized as the recognition and affirmation of:

1. The legal duty of States to actively protect human rights not only from state intervention but also from private actors, including business enterprises;
2. The corporate responsibility to respect human rights: This essentially means that, in addition to compliance with applicable national legislation, business enterprises should act with due diligence to avoid interfering with the exercise of human rights, and to address adverse human rights impacts of their business operations;
3. The need for appropriate and effective judicial and non-judicial remedies in case of human rights violations (states) or adverse human rights impacts (companies).

Each of these three pillars is an essential component in an inter-related and dynamic system of preventative and remedial measures. With regard to food security, the main focus has so far been on the state duty to protect with measures such as the Seoul Action

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<sup>52</sup> European Parliament legislative resolution of 29 March 2012 on the proposal for a regulation of the European Parliament and of the Council on over the counter (OTC) derivatives, central counterparties and trade repositories (COM(2010)0484 – C7-0265/2010 – 2010/0250(COD)).

Plan or the Dodd-Frank Act. The launch of *AgResults*<sup>53</sup> marks one of the first initiatives to address corporate impact on food security. It does however not refer to corporate responsibility but applies an incentive-based economic approach.

*c) The Corporate Responsibility to Respect Human Rights*

While national legislations may impose corresponding obligations on companies operating within their jurisdiction, as a matter of international law, business enterprises have no direct legal obligation to comply with human rights. Strictly speaking, therefore, the corporate responsibility to respect human rights is not a legal obligation under international law, but rather corresponds to a basic societal expectation as to the conduct of business enterprises and ethical corporate behaviour. Nevertheless, companies are expected to respect human rights regardless of whether they are embedded in the legal system of the country where they operate. Even in the absence of binding human rights obligations complicity in gross human rights abuses may result in legal liability under extraterritorial civil jurisdiction such as the US Alien Tort Claims Act.<sup>54</sup> The General Principles therefore advise to address human rights as an issue of legal compliance.<sup>55</sup>

A risk-based approach to address human rights is not completely new for the private sector. With regard to financial institutions, the Basel II Framework already required financial institutions to include legal risks such as liability claims in their risk assessment.<sup>56</sup> Still, for most businesses, systematically assessing human rights-related risks is to a large extent unknown territory.

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<sup>53</sup> Above p. 7 et seq.

<sup>54</sup> At the time of this writing, the US Supreme Court is considering a complaint which challenges the application of the ATCA to corporations: *Kiobel v Royal Dutch Petroleum et al*, 10-1491, Supreme Court order in pending case, 5 March 2012.

<sup>55</sup> General Principles (fn 6), no. 23.

<sup>56</sup> Basel Committee on Banking Supervision (BCBS), International Convergence of Capital Measurement and Capital Standards, revised framework, consolidated version, Basel June 2006, para. 115 (Basel II). This definition is not affected by the new Basel III framework: Revisions to the Basel II market risk framework, updated as of December 2010, Basel, February 2011.

The *scope* of corporate responsibility to respect human rights has been at the heart of the debate. In order to be operational in a business context, requirements need to be as specific as possible (“*what* is required”). In essence, the corporate responsibility to respect human rights means that companies should avoid interfering with the exercise of human rights and address adverse human rights impacts of their business operations.

In addition, the *substantial scope* of corporate responsibility needs to be defined. According to the Guiding Principles, the notion of human rights includes, as a minimum, the International Bill of Human Rights (UDHR, ICCPR, ICECSR) and the ILO-Declaration on Fundamental Principles and Rights at Work.<sup>57</sup>

The Guiding Principles are applicable to *all* business enterprises, therefore all businesses have the responsibility to respect human rights, regardless of their size, sectoral activity, operational context, ownership and structure.<sup>58</sup>

Finally, in clear departure from earlier “sphere of influence” concepts, business responsibility to respect human rights not only refers to their own activities, but extends also to adverse human rights impacts *directly linked* to their operations or products or to services by their business relationships.<sup>59</sup> This is of particular relevance in the context of food security, given the long and complex supply chain.<sup>60</sup>

The Guiding Principles do not provide substantial requirements for businesses but instead focus on process: In order to implement their responsibility to respect human rights in operational practice, business enterprises should establish the following policies, processes and mechanisms:

- A human rights policy;
- A human rights due-diligence process;
- A grievance and remediation mechanism.<sup>61</sup>

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<sup>57</sup> General Principles (fn 6), no. 12.

<sup>58</sup> General Principles (fn 6), no. 14.

<sup>59</sup> General Principles (fn 6), nos. 11 and 13.

<sup>60</sup> Maloni/Brown (fn 4).

<sup>61</sup> General Principles (fn 6), no. 15.

### **3. Impact assessment and due diligence**

The purpose of the human rights due-diligence process as an element of the corporate responsibility to respect is to identify, prevent, mitigate, and address actual and potential human rights impacts in operational practice. Due diligence is understood as not a one-time assessment, but a continuous process taking into account that, over time, human rights risks may evolve along with a company’s operations and business environment.<sup>62</sup>

In contrast to earlier discussions in the context of the Draft Norms,<sup>63</sup> the scope of a human rights due diligence process is not delimited by a fixed “sphere of influence” but, rather, depends on the potential and actual human rights impacts resulting from (i.e. directly or indirectly caused by) a company’s business activities and the relationships connected to those activities.<sup>64</sup> Thus, human rights due diligence processes should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships.<sup>65</sup> Applied to food security, business actors such as banks are required to assess their own activities’ impacts as well as actions by their business partners. In particular, a company’s due-diligence process should avoid complicity in human rights abuses committed by third parties, whether States or non-state actors. In essence, complicity denotes that a company knew or should have known (i.e. could reasonably be expected to know) that its activities or omissions would contribute to human rights abuses.<sup>66</sup> The complexity and design of the due diligence process will vary with factors such as the size of the business enterprise, the severity of potential human rights impacts, and the nature and context of its operations.<sup>67</sup> In any case, however, a successful due diligence process should involve the following indispensable components: Human rights impact assessment, effective integration and

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<sup>62</sup> General Principles (fn 6), no. 17.

<sup>63</sup> Above fn 48.

<sup>64</sup> PRR, § 72.

<sup>65</sup> Guiding Principles (fn 6), no. 17.

<sup>66</sup> Protect, Respect and Remedy Framework (note 6), para. 79.

<sup>67</sup> General Principles (fn 6), no. 17.

appropriate action, tracking of response effectiveness, internal and external response communication. Operationalizing these principles requires a clear vision of what the different standards entail.<sup>68</sup>

In December 2011, The Special Rapporteur on the Right to Food, Olivier de Schutter submitted “Guiding principles on human rights impact assessments of trade and investment agreements” to the UN Human Rights Council.<sup>69</sup> The guiding principles address states but include some reference with regard to business activities. Guiding principle 2 states:

“States must ensure that the conclusion of any trade or investment agreement does not impose obligations inconsistent with their pre-existing international treaty obligations, including those to respect, protect and fulfil human rights.”

In the commentary, de Schutter elaborates that the primary responsibility is on states:

“Second, States should protect human rights. They must therefore ensure that they will not be precluded from the possibility of controlling private actors whose conduct may lead to violating the human rights of others, for example as a result of an excessively high level of protection of foreign investors established on their territory or because of a broad understanding of the prohibition of imposing performance requirements on such investors.”<sup>70</sup>

In an earlier report to the UN Human Rights Council de Schutter addressed one specific aspect of business activities with a potentially negative impact on food security: contract and large scale farming.<sup>71</sup> The report is based on the assumption that in order to foster food security small scale farming needs to be supported. Again, the primary responsibility to reach this goal – which is not undisputed among economists and agricultural scientists – is on states.

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<sup>68</sup> For a critical view with regard to the current development of operationalization Rob Gray, Sue Gray, *Accountability and human rights: A tentative exploration and a commentary*, Critical Perspectives on Accounting 22 (2011) 781– 789.

<sup>69</sup> Guiding principles on human rights impact assessments of trade and investment agreements, 19 December 2011, A/HRC/19/59/Add.5.

<sup>70</sup> Guiding principles on human rights impact assessment (fn 69), para. 2.3.

<sup>71</sup> Above fn 28.

At the same time, the private sector is in many areas redefining its role to be more that of a partner of the state with some common development objectives.<sup>72</sup> The motivations for engaging in such a partnership are however different for the state and the private sector.<sup>73</sup> Research on what the key drivers for business behavior are is still in its infancy. First results indicate that depending on the circumstances CSR and human rights policies may be a reaction to consumer preferences, to a perceived lack in (state) regulation, especially in countries with weak governance or a means to overcome misaligned interests between individuals and public policies. An example for a far reaching business initiative is the Nestlé Cocoa Plan<sup>74</sup> which *inter alia* includes the training of farmers and improving social conditions in cocoa-growing areas. Nestlé describes its motivation as follows:

“To enhance our ability to continue to do business in the future, make better quality chocolate and satisfy consumer preference, it is vital that we ensure the wellbeing of the cocoa farmers that supply us and the communities in which they live.”

Nestlé’s “create shared value” policy was partially developed as a reply to consumer and regulatory initiatives such as the Harkin Engel proposal in the United States<sup>75</sup> or consumer movements calling for sustainable production. In other words, business initiatives may not necessarily be motivated by human rights considerations about food

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<sup>72</sup> Some case studies can be found in Surabhi Chopra, *The Right to Food and Water: Dependencies and Dilemmas*, Institute for Human Rights and Business, London 2010. Available at [http://www.ihrb.org/pdf/Right to Food and Water Dependencies and Dilemmas.pdf](http://www.ihrb.org/pdf/Right%20to%20Food%20and%20Water%20Dependencies%20and%20Dilemmas.pdf) (accessed 19 June 2012).

<sup>73</sup> David A. Waldman, Donald S. Siegel, Mansour Javidan, *Components of CEO Transformational Leadership and Corporate Social Responsibility*, *Journal of Management Studies* 43 (2006) 1703–1725; Christian Voegtlin, Moritz Patzer, Andreas Georg Scherer, *Responsible Leadership in Global Business: A New Approach to Leadership and Its Multi-Level Outcomes*, *Journal of Business Ethics* 105 (2012), 1–16.

<sup>74</sup> Available at <http://www.nestle.com/csv/ruraldevelopment/cocoa/Pages/cocoa.aspx> (accessed 19 June 2012).

<sup>75</sup> “Harkin-Engel Protocol”, originally initiated with HR 2330, 107<sup>th</sup> Cong (2001), amended by H amdt. 142, 147 Cong Rec H3781-83, 3786-87 (daily edition 28 June 2001): Protocol for the Growing and Processing of Cocoa Beans and their Derivative Products in a Manner that Complies with ILO Convention 182 Concerning the Prohibition and Immediate action for the Elimination of the Worst Forms of Child Labor. Available at <http://www.cocoainitiative.org/en/reports/harkin-engel-protocol> (accessed 21 June 2012).



security but by responding to business necessities and by creating shared value. Therefore, the question arises whether there is a *business case* for the private sector to contribute to food security.

#### **4. Food security as opportunity and risk for business**

##### *a) The business case for human rights: fact or fiction?*

“Human rights compliance is good for business”. Recent research indicates a positive correlation between corporate social responsibility and firm value for firms in controversial industries.<sup>76</sup> Yet, despite new developments such as the shared value concept it is still difficult to scientifically prove the long sought-for “business case for human rights”.<sup>77</sup>

With its assumption that it is societal needs not only economic needs that define markets, the *Shared Value Approach*, a concept developed by Porter and Kramer, joins other conceptual initiatives which apply a holistic approach to defining both market outcomes and costs. Applied to food security, a violation for instance by water pollution would not be addressed as a human rights violations per se but as an externality that creates costs for the society while at the same time also leading to internal costs to the company involved due to wasted resources, negative publicity etc.<sup>78</sup> As a result, the proponents of this approach abandon the in their view “old, narrow view of capitalism” according to which “business contributes to society by making a profit, which supports employment, wages, purchases, investment and taxes.”<sup>79</sup> From a human rights perspective, establishing a link between the use of freedom of economic activities and the human rights of people affected by economic activities is nothing new. Other than suggested by proponents of the shared value approach, modern conceptions of corporate social responsibility and sustainability are already built precisely on this

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<sup>76</sup> Ye Cai, Hoje Jo, Carrie Pan, *Doing Well While Doing Bad? CSR in Controversial Industry Sectors*, Journal of Business Ethics 108 (2012), 467-489.

<sup>77</sup> Manuela Weber, *The business case for corporate social responsibility: A company-level measurement approach for CSR*, European Management Journal 26 (2008), 247-261.

<sup>78</sup> Porter/Kramer 2011 (fn 44), 65.

<sup>79</sup> Porter/Kramer 2011 (fn 44), 66.

insight. In fact, the relationship between economic welfare, human rights and peace can be traced back all the way to the Atlantic Charter of 1941.<sup>80</sup>

According to Porter and Kramer, Shared Value is a clear departure from any CSR concept. However, with its clear stance that Shared Value is not about redistribution but rather “expanding the overall amount of value created”<sup>81</sup>, the individual aspect of food security which requires the fulfilment of basic requirements for *every* single individual is not addressed. This becomes most striking when Porter and Kramer argue that fair trade understood as increasing the proportion of revenue that goes to poor farmers by paying them higher prices for the same crops has a distributive effect on the affected farmers while the Shared Value approach would lead to a “bigger pie of revenue and profits that benefits both farmers and the companies that buy from them” they do not address the fact, that very poor farmers may not be able to participate in these benefits. Their example of Côte d’Ivoire, according to which fair trade can increase farmers’ incomes by 10% to 20% while shared value investments can raise their incomes by more than 300%, from a food security perspective misses the point. Implementing food security is not only about raising *average* income and overall access to food but includes safeguards to make sure that *every* individual can enjoy his or her right to food. The two concepts of human rights based CSR on the one hand and Shared Value on the other are therefore not incompatible but based on different conceptual approaches. It is therefore interesting to note that in a reply to a related criticism by John Elkington, Mark Kramer conceded that Shared Value and CSR must not be seen as mutually exclusive but rather as complementary strategies.<sup>82</sup>

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<sup>80</sup> Reprinted in: Samuel Irving Rosenman (ed), *The Public Papers and Addresses of Franklin D Roosevelt*, New York 1938, 314

<sup>81</sup> Porter/Kramer 2011 (fn 44), 65.

<sup>82</sup> The controversy took place in the context of an online debate with the Guardian, available at: <http://www.guardian.co.uk/sustainable-business/shared-value-how-corporations-profit-social-problems> (accessed 20 June 2012).

*b) Food security as an element of risk management*

Since the business case argument cannot be generally applied to supporting compliance with food security by the business sector, an approach which applies risk management theories seems to be more promising in order to raise business awareness.

How does food security become an issue in a business context? One avenue is a specific incident that sparks a public discussion in which NGOs may play an important role. A recent example is a campaign against several financial institutions labelling them “Hunger-Makers” because of their investment policies.<sup>83</sup> A few months after the launch of the campaign, one of the targeted institutions, Deutsche Bank announced that “recent debate on the impact of commodity speculation has prompted Deutsche Bank to reflect on its role in solving global hunger”.<sup>84</sup> The internal debate was conducted in the broader framework of Corporate Social Responsibility and Climate Change. From an operational perspective, rather than discussing human rights implications of activities from a general ethical view, it is more likely that negative human rights impacts will be framed as *risks*.

There is a variety of risks for a company which may occur because of its perceived or alleged involvement in violating food security.

*Legal risks* may include investigations, litigation or prosecution under foreign or domestic national law; international or national prosecution of key personnel; withdrawal of operating licenses; stricter regulation; adverse shareholder action; divestment laws. Unlike reputational risks, legal risks are included in the Basel II framework and need to be assessed.<sup>85</sup> Recent examples include liability under the US Alien Tort Claims Act (ATCA) or the US Sudanese divestment law. In addition, depending

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<sup>83</sup> Foodwatch, *The Hunger-Makers*. How Deutsche Bank, Goldman Sachs and other Financial Institutions are Speculating with Food at the Expense of Poorest, Berlin 2011, by Harald Schumann, available at <http://foodwatch.de/e10/e45260/e45263> (accessed on 20 June 2012).

<sup>84</sup> Statement of 4 May 2012, available at <[http://www.banking-on-green.com/en/content/our\\_sustainability\\_approach/agriculture\\_4461.html](http://www.banking-on-green.com/en/content/our_sustainability_approach/agriculture_4461.html)> (accessed on 20 June 2012).

<sup>85</sup> See also BCBS, Principles for enhancing corporate governance, Basel October 2010.

on jurisdiction, contributing to a human rights violation may trigger criminal responsibility of the management.<sup>86</sup>

*Reputational* risks relate to negative media coverage, protests by population segments or official authorities; divestment campaigns). Due to modern communications technologies and social media such as facebook, potential human rights problems are easily made public and public pressure builds fast.

*Operational* risks occur when projects are delayed, business relations terminated or key personnel are lost.

Finally, controversies about alleged human rights violations may invoke *security risks* such as aggressive or terrorist threats and action, a need to evacuate areas, suspension or termination of business operations).

## **VI. Towards an integrated three-dimensional approach to food security**

This paper has outlined several deficits that hinder a comprehensive implementation of food security by all involved actors, i.e. at the micro-, meso- and macro-level. In order to overcome these obstacles, the following three proposals are submitted:

### **1. Need for analysing motivation and dynamics at the meso- (business-) level**

This paper shows that current initiatives to improve food security such as the Seoul Action Plan or proposals to revise the WTO Agreement on Agriculture focus on the state duty to protect the right to food. Only rarely is the essential role that business activities can play in this regard addressed. A recent example is *AgResults* which is based on common insights on business incentives but still does not include any reference to the work of the UN Human Rights council and especially the new Protect, Respect and Remedy Framework. While a lot of research has been done to better understand and conceptualize the dynamics between individuals as right-holders and states as duty-bearers of the right to food security, little do we know about the motivation that triggers

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<sup>86</sup> Complaint of asbestos victims against two former board members of their employer Eternit spa in Italy, decision by the Tribunale di Torino of 13 February 2012. Available at [http://www.diario-prevenzione.it/docbiblio/sentenza\\_eternit.pdf](http://www.diario-prevenzione.it/docbiblio/sentenza_eternit.pdf) (accessed 21 June 2012).

the activities of businesses as key actors in the food supply chain. New research suggests that the institutional dynamics in which businesses act play an important role in shaping motivation and policy-making.<sup>87</sup>

## **2. Improving regulatory procedure: Mainstreaming the Protect, Respect and Remedy Framework into business-related policies and regulations**

With the unanimous adoption of the Protect, Respect and Remedy Framework and the respective Guiding Principles by the UN Human Rights Council, mainstreaming them into business-related activities of all stakeholders is a priority. This has been acknowledged by the UN Working Group on human rights and transnational corporations in its first report to the Human Rights Council<sup>88</sup> and further been elaborated on in its working methods:

“[...] he Working Group’s activities will focus on

Embedding the Guiding Principles into global governance, including as a means of enhancing accountability.

Ensuring that the Guiding Principles are fully embedded into the work of key global and regional institutions and mechanisms, and ensuring further global convergence around the Guiding Principles and synergies with other actors and processes in the area of business and human rights.”<sup>89</sup>

Including these principles in economic institutions will require particular efforts and a clear mainstreaming concept.

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<sup>87</sup> Kunal Basu, Guidio Palazzo, *Corporate Social Responsibility: A Process Model of Sensemaking*, Academy of Management Review, 33 (2008), 122–136;

<sup>88</sup> Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, 10 April 2012, A/HRC/20/29, para. 75.

<sup>89</sup> Working Group on the issue of human rights and transnational corporations and other business enterprises, Methods of work, available at : <http://www.ohchr.org/EN/Issues/Business/Pages/WorkingMethods.aspx> (accessed 20 June 2012).

### **3. Improving regulatory substance: Include findings from meso-level analysis in substance of regulations**

Apart from enhancing research regarding the meso-level, *regulatory improvements* at the macro-level are necessary. As indicated, several regulatory initiatives were launched with a view to increase food security. While these instruments include state of the art scientific findings from agricultural and economic research there is no reference to new regulatory concepts as contained in the UN Protect, Respect and Remedy Framework. Instead, the old mantra of the strict dichotomy between private, voluntary standards on the one and state-led binding hard law on the other hand is repeated. This is not only deplorable from a scholarly point of view but also particularly worrisome because it leads to initiatives such as the European “Law without borders” campaign by which NGOs urge states to introduce binding regulation to holding companies responsible and take them to court in case of non-compliance with human rights.<sup>90</sup> Such an initiative despite its noble cause neglects the fundamental underpinnings of how business decisions and policies are shaped. It lies in the nature of human rights and especially complex social right such as food security that they are only partially suited for a comprehensive regulatory coverage. Law-making is a slow process and rarely able to catch up with innovative technological developments in agriculture or financial industry (food derivatives). If food security is to be promoted efficiently, it will therefore depend on businesses going beyond the call of legal duties and engage in “voluntary” commitments. Obviously, incentives, whether risk- or profit-induced, play an important role in shaping such commitments. In this light, it is questionable whether well-meant proposals such as a mandatory obligation for financial institutions to report on the specific human rights responsibilities they (voluntarily) committed to may in fact be counterproductive. Based on a business rationale, a company may think twice about voluntarily subscribing to human rights standards if such a commitment may induce legal liability and therefore contain risks.<sup>91</sup>

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<sup>90</sup> European Coalition for Corporate Justice, Corporate Justice Campaign, available at < <http://www.corporatejustice.org/Corporate-Justice-Campaign.html>> (accessed 21 June 2012).

<sup>91</sup> Such a reporting obligation is considered in *A renewed EU strategy 2011-14 for Corporate Social Responsibility*, 25 October 2011, COM(2011) 681 final, in Intention No. 7, available at

In sum, taking into account new developments and research on how the private sector interacts with individuals and the public requires a departure from traditional state-led only rule-making procedures. Only then will the regulatory environment be ready to address the many challenges for food security in the 21<sup>st</sup> century.